No. 3597

United States Circuit Court of Appeals

LEMUEL S. FOWLER AND THOMAS SINGER,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA
Defendant in Error.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

BRIEF OF PLAINTIFFS IN ERROR

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For the Ninth Judicial Circuit

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STATEMENT OF THE CASE

Plaintiffs in Error, Lemuel S. Fowler and Thomas Singer, were on June 7, 1920, found guilty on an indictment charging conspiracy in three counts. Judgment was passed upon each defendant that he serve a sentence of eighteen months in the Federal Penetentiary at McNeils Island, Washington, and pay a fine of $500 on each count, the sentence of eighteen months on each count to be served concurrently and the fine of $500 on each count to be paid as imposed,

which said goods and chattels, prior to said buying, receiving, concealing, and possessing by the said conspirators as aforesaid had been and would have been knowingly, wilfully, unlawfully, and feloniously stolen, taken, carried away and obtained by fraud and deception from certain railroad cars, railroad station-houses, railroad platforms, and railroad depots, with the intent then and there on the part of such person so stealing, taking, carrying away and obtaining said goods and chattels to convert the said goods and chattels to his own use, and the said goods and chattels when so stolen, taken, carried away and obtained, being then and there moving as and part of and constituting certain interstate and foreign shipments of freight and express, that they, the said conspirators, and each of them, then and there well knew and would and should well know at the times of buying, receiving and possessing said goods and chattels as aforesaid that the said goods and chattels had heretofore been stolen.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said Thomas E. Jones, Creed Lane, Edward Bourdell and Clarence H. Bellamy and each of them on the 25th day of January, 1920,

did knowingly, wilfully, unlawfully and feloniously, in the Northern Division of the Western District of Washington, ride upon and accompany that certain railroad train from Ellensburg to the town of Auburn, containing as a part thereof a certain railroad car known as and bearing initials and number C. P. & St. L. 4188, then and there operated on the railroad route and transportation system of the Northern Pacific Railway Company under Federal control.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said Thomas E. Jones and Creed Lane, on, to wit, the 31st day of July, 1919, did then and there ride upon and accompany from Ellensburg to the town of Auburn in the Northern Division of the Western District of Washington, that said railroad train then and there including as a part thereof that certain railroad car known as and bearing initials and number N. P. 31800, upon and over the route and transportation system of Northen Pacific Railway Company then and there under Federal control.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object of said conspiracy, the said Thomas E. Jones, Edward Bourdell, Clarence H. Bellamy and Creed

ing interstate or foreign shipments, the unlawful entering of such cars, the stealing of freight and express packages or baggage or articles in process of transportation in interstate shipment, and the felonious asportation of such freight or express packages or baggage or articles therefrom into another district of the United States, and the felonious possession or reception of the same," it being then and there the plan, purpose and object of said conspiracy and of the said conspirators, that they, the said conspirators, should and would knowingly, willfully, unlawfully and felioniously break the seals of said railroad cars containing interstate and foreign shipments of freight and express with the unlawful and felionious intent then and there on the part of the conspirators ,and each of them, to commit larceny in said certain cars; it being then and there the further plan, purpose and object of the said conspiracy, and of the said conspirators, that they, the said conspirators, and each of them should and would knowingly, wilfully and unlawfully enter certain railroad cars then and there containing interstate and foreign shipments of freight and express with the unlawful and felionious intent then and there on the part of the said conspirators, and each of them, to commit larceny in said cars; and it

being then and there the further plan, purpose and object of the said conspiracy, and of the said conspirators, that they the said conspirators should and would knowingly, wilfully, unlawfully and feloniously steal, take, carry away and conceal, and by fraud and deception obtain from certain railroad cars, railroad stationhouses, railroad platforms and railroad depots, with the unlawful and felonious intent then and there on the part of said conspirators, and each of them, to convert to the on use of said conspirators and each of them ,certain goods and chattels, of value then and there moving as interstate and foreign shipments of freight and express, and then and there being a part of and constituting interstate and foreign shipments of freight and express, all as the said conspirators then and there well knew and should and would well know at the time and in the execution of the said conspiracy and the object thereof; it being then and there the further purpose, plan and object of the said conspiracy and of the said conspirators, and each of them, would and should know-spirators, that they, the said conspirators, and each of them, would and should knowingly, wilfully, unlawfully, and feloniously, buy, receive, conceal and have in the possession of the said conspirators, and each of them, certain goods and chattels,of value.

making an aggregate fine to be paid of $1500.00.

The plaintiffs in error within the time limited by law moved for a new trial, which motion was by the Court overruled and exception thereto allowed, and likewise, within said time filed a motion for arrest of judgment, which was also denied. A Writ of Error was granted, bringing the case to this court.

Those indicted on each count as conspirators were: Lemuel S. Fowler, George E. White, Clarence H. Bellamy, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, JoeVeagus, Herbert William Hanson, Ethyl Hanson, William Ratcliff, James Francis Mellison, Thomas Singer, David Jones, Creed Lane, George H. Trepanier and Mrs. J. A. Lewis.

Before the cause was submitted to the jury the trial judge directed a verdict of not guilty for George H. Trepanier, Joe Veagus and Albert Bruce Paris. The jury returned a verdict of guilty against Edward Bourdell, a judgment, however, was not passed upon him, as he committed suicide during the trial. All the other thirteen defendants, whose case was submitted to the jury were acquitted with the exception of Lemuel S. Fowler, Thomas Singer, the plaintiffs in error herein and Creed Lane and Her-

bert William Hanson.

The indictment, omitting the caption was as follows:

COUNT I.

That on, to wit, the 30th day of March, 1918, and Continuously thereafter to the time of the presentment of this indictment, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Lemuel S. Fowler, George E. White, Clarence H. Bellamy, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Herbert William Hanson, Ethyl Hanson, Creed Lane, William Ratcliff, James Francis Mellison, Thomas Singer, David Jones, George H. Trepanier and Mrs. J. A. Lewis, have knowingly, wilfully, unlawfully, corruptly and felioniously combined, conspired, confederated and agreed together, and one with the other and together, and with divers other persons to the grand jurors unknown, all of the said defendants herein above named, and said other persons unknown being hereinafter called the conspirators, to commit an offense against the United States, that is to say, to violate Section 1 of the Act of Congress approved February 13th, 1913, entitled "An Act to punish the unlawful breaking of seals of railroad cars contain-

Lane did knowingly, willfully, unlawfully and feloniously ride upon and accompany from Auburn, in the Northern Division of the Western District of Washington, to Ellensburg, that certain train then and there including as a part thereof that certain car known as and bearing initials and number N. P. 96,333, then and there moving upon and along the route and transportation system of the Northern Pacific Railway Company, then and there under Federal control.

That after the formation of said conspiracy, and in pursuant thereof, and in order to effect the object thereof, the said Thomas E. Jones and Creed Lane on the 12th day of February, 1920, at Auburn, in the Northen Division of the Western District of Washington, did then and there knowingly, willfully, unlawfully, and feloniously approach and examine that certain railroad car known as and bearing initials and number C. B. & Q. 38,573, which said car then and there was included and a part of a railway train being and about to be moved and operated over the railroad route and transportation system of the Northern Pacific Railway Company, then and there under Federal control.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the ob-

ject thereof, the said Creed Lane on the 6th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously enter that certain railroad car known as and bearing initials N. P. 96,333, then and there being included in and a part of that certain train then and there being moved and operated in the railroad route and transportation system of the Northern Pacific Railway Company, then and there under Federal control.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object hereof, said Thomas E. Jones on the 12th day of February, 1920, did knowingly, wilfully, unlawfully and feloniously ride upon and accompany from Ellensburg to Auburn, in the Northen Division of the Western District of Washington, that certain train including as a part thereof that certain car known as and bearing initials and number M. C. 61,-880, then and there being moved and operated upon the railroad route and transportation system of the Northern Pacific Railway Company, then and there under Federal control.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object

thereof, the said Thomas E. Jones and the said Joe Veagus at East Auburn, in the Northern Division of the Western District of Washington, on the 24th day of February, 1920, did then and there knowingly, wilfully, unlawfully and feloniously talk and converse together.

That after the formation of the said conspiracy, and in pursuance thereof, and in order to effect the object thereof, the said Creed Lane, on the 17th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did then and there knowingly, willfully, unlawfully and feloniously possess and conceal certain articles goods, wares and merchandise theretofore feloniously stolen from certain railroad cars while moving as and constituting parts of interstate and foreign shipments of freight and express, to wit, six overcoats, hosiery, one shotgun, shirts, shoes, cotton goods, cotton gloves, electric caps, phonographs, records, cigarettes and other articles, a more particular description thereof being to the grand jurors unknown.

That after the formation of the said conspiracy, and in pursuance thereof, and in order to effect the object thereof the said George E. White, on the 25th day of February, 1920, at Auburn, in the Northern

Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal certain articles, goods, wares and merchandise theretofore feloniously stolen from a railroad car moving in interstate commence and being and constituting a part of an interstate shipment of freight, to wit, one certain man's overcoat, shoes, neckties, padlocks, three bottles of Jergin's lotion, benzoin, men's shirts, razor strops and other goods and chattels, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Clarence H. Bellamy, on the 25th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal certain goods, chattels, wares and merchandise theretofore feloniously stolen from a railroad car, railroad station-house, railroad platform and railroad depot, while moving as and constituting a part of an interstate shipment of freight and express, to wit, men's shoes, together with other articles, goods, merchandise, and chattels, a more particular description whereof is to the grand jurors unknown.

That after the formation of said consipiracy and in pursuance thereof, and in order to effect the object thereof, the said Albert Bruce Paris, on the 25th day of February, 1920, at Auburn, in Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously have, possess and conceal certain chattel goods, wares and merchandise theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad platforms and railroad depots, while moving goods, wares, merchandise and chattels, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Thomas E. Jones, on the 25th day of February, 1920, at Auburn, in the Northern Division of the Western District of Washington did then and there knowingly, wilfully, unlawfully, and feloniously possess and conceal certain goods, wares, merchandise and chattels theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad platforms and railroad depots, while moving as and constituting a part of an interstate shipment of freight and express, to wit, canvas

gloves, one hundred Mazda electric light bulbs, canned goods, whiskey bottles, bacon, grain in sacks and one sack of sugar, together with other goods, chattels, wares and merchandise, a more particular description whereof is to the grand jurors unknown.

That after the formation of the said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Edward Bourdell, on the 25th day of February, 1920, at Auburn in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully and unlawfully and feloniously have, possess and conceal certain goods, chattels, wares and merchandise theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad platforms and railroad depots, while moving as and constituting a part of an interstate shipment of freight and express, to wit, certain razor strops, together with other goods, wares, merchandise and chattels, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object thereof, the said Sarah Jones, on the 25th day of February, 1920, at Auburn, within the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and

feloniously have, possess, and conceal certain goods, wares, merchandise and chattels, theretofore feloniously stolen from certain railroad cars, railroad station-houses, railroad platforms and railroad depots, while moving as and constituting a part of interstate shipments of freight and express, to wit, certain shoes and dress goods, together with other goods, wares, merchandise and chattels, a more particular description whereof is to grand jurors unknown.

That after the formation of said consipracy and in pursuance thereof, and in order to effect the object thereof, the said Mrs. J. A. Lewis (whose true Christian name is to the grand jurors unknown), on the 29th day of March, 1920, at the St. Elmo Hotel, at the city of Auburn, in the Northern Division of the Western District of Washington, at 2 o' clock A. M. arose and came down to the front door in her wrapper to answer an enquiry made of her then and there by one William Ratcliff, when and where and under these circumstances the following conversation took place between the said Mrs. J. A. Lewis and the said William Ratcliff; William Ratcliff said, "Mrs. Lewis, where is Fowler? Why didn't he meet us as agreed?" Mrs. Lewis replied, "He is up at Cemetery Hill getting those auto tires, and should be back any

time." Mrs. Lewis then asked William Ratcliff, "Do you know the man you are dealing with over these tires?" Ratcliff replied, "I know him and know he is all right," Mrs. Lewis said, "How do you know he is all right?" Ratcliff replied, "He was sent in to me by a friend who told me this man was O. K."

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Mrs. J. A. Lewis (whose true Christian name is to the grand jurors unknown) on the 30th day of March, 1920, at the residence of Mrs. Maud Ratcliff, 111 South Maude Street, at the city of Auburn, in the Northern Division of the Western District of Washington, spoke concerning the trouble the boys were in over the auto tires and mentioned Lemuel S. Fowler, William Ratcliff and Herbert William Hansen and their trip over the auto tires and their cases of shoes, and then said: "Had I looked out my front door when Mr. Ratcliff came to my hotel at 2 o'clock Sunday morning and asked for Fowler, and why he had not met them, and when I said that he had gone for the auto tires, had I seen the man that was in the automobile I could have told then and there that the man was dangerous and that it was foolish for them to have any business

transactions with him in any manner."

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Mrs. J. A. Lewis (whose true Christian name is to the grand jurors unknown), on the 2nd day of April, 1920, at the St. Elmo Hotel, in the city of Auburn, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal six (6) steak knives theretofore stolen and known to so have been stolen by the said Mrs. J. A. Lewis from a shipment contained in G. N. freight-car 211,470, consigned to Wells Butcher Supply Co., Seattle, State of Washington, from Russel Cutlery Co., Turner Falls, State of Massachusetts.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Thomas E. Jones, and Edward Bourdell, being there and then members of the train crew handling and hauling freight car, G. N. 211,470 in train Extra West, arriving at Auburn, in the Northern Division of the Western District of Washington, on March 26, 1920, did then and there knowingly, wilfully, unlawfully and feloniously possess and conceal certain articles, goods, wares, and mer-

chandise theretofore feloniously stolen from that certain last above mentioned freight railroad car while moving as and constituting part of interstate shipments of freight and express, to wit, one suit, man's grey and brown mixed, constituting part of a shipment moving in interstate commerce from Baltimore, Maryland, to Seattle, Washington, and consigned to Lundquist-Lilly Co.; also divers and sundry cutlery theretofore stolen and known so to have been by said defendants Thomas E. Jones and Edward Bourdell and George H. Trepanier from a shipment contained in the aforesaid G. N. freight-car 211,470, consigned to Well, Butcher Supply Co., Seattle, Washington from Russell Cutlery Co., Turner Falls, Mass.; also four new adjustable auto wrenches theretofore stolen as aforesaid from said interstate shipment ; also one new four pane widow sash, boxed, from and out of said interstate shipment contained in said car; also one brown mixed goods Mackinaw; also various and sundry men's caps, hats, grain sacks and other haberdashery, merchandise and groceries so stolen as aforesaid from and out of said shipments; also boots and shoes theretofore stolen from said interstate shipments moving in interstate commerce on and upon said railroad; all of which said divers and sundry goods and wares

and merchandise were each and severally found in the caboose 1850 attached to said interstate trains, G. N. 211,470, then and there in charge of Conductor Thomas E. Jones, and Brakeman Edward Bourdell.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof, the said Thomas Singer on the 26th day of March, 1920, at Seattle, in the Northern Division of the Western District of Washington, did then and there knowingly, wilfully, unlawfully and feloniously receive, possess and conceal two suits of men's clothing from the defendant Edward Bourdell,theretofore feloniously stolen from a certain railroad car while moving as and constituting part of interstate and foreign shipments of freight and express, to wit, G. N. freight-car 211,470 carrying one case men's suits consigned to Lundquist-Lilly Co., Seattle, Washington, from L. Greiff & Bros., Baltimore, Maryland.

That after the formation of the said conspiracy and in pursuance thereof and in order to effect the object thereof, the said Thomas Singer did on the 29th day of February, 1920, at Seattle, Washington, knowingly, wilfully, unlawfully and feloniously received and possess one man's overcoat from defend-

ant Bourdell, he the said Thomas Singer well knowing that the same had theretofore been stolen from goods moving in interstate commerce shipments, to wit, from and out of C. P. & St. L. freight-car 4188, containing a shipment of men's overcoats consigned from Hart, Schaffner & Marx to M. Prager & Co., Seattle, Washington.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, the said Edward Bourdell did knowingly, wilfully, unlawfully and feloniously on March 1, 1920, go to, visit and see the said defendant Thomas Singer at his place of business at 304 Denny Building, Seattle, Washington.

That after the formation of said conspiracy, and in pursuance thereof, and in order to effect the object thereof, the said Thomas Singer did on the first day of March, 1920, knowingly, wilfully, unlawfully and feloniously offer to buy and negotiate for certain goods, wares and merchandise from the said defendant Edward Bourdell, knowing the same to have lately theretofore been stolen from interstate commerce shipments.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the ob-

ject thereof, the said Clarence H. Bellamy, Thomas E. Jones, Herbert William Hanson, Lemuel S. Fowler and Edward Bourdell did on the 16th day of April, 1920, at Auburn in the Northern Division of the Western District of Washington, then and there knowingly, wilfully, unlawfully and feloniously meet and confer together in a certain room in the Lloyd Hotel.

That after the formation of the said conspiracy and in pursuance thereof, and in order to effect the thereof object, the said Herbert William Hanson, William Ratcliff and David Jones, did knowingly, wilfully, unlawfully and feloniously on February 28, 1920, enter railroad freight-car P. F. E. 12,320, then and there moving in interstate commerce for the Northern Pacific Railway Company, in said Northern Division of the Western District of Washington, containing a shipment of interstate commerce of shoes consigned by Peters Shoe Co., St. Louis, Mo., to J. H. Taylor, Seattle Washington, and knowingly, wilfully, unlawfully and feloniously remove from said car four cases of said shoes, the whole of said shipment and destroy the way-bill under which the said shipment was moving, and hide and conceal said shoes at a point at Mile Post 91, in King County,

Washington, and about one hundred yards from the railroad right of way.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, Herbert William Hanson, William Ratcliff and David Jones on the 2nd day of March, 1920, wilfully, knowingly, unlawfully and feloniously entered that certain railway freight-car, Penn car 43,493, and stole, took and carried away therefrom three rolls of grass matting, theretofore shipped from China in foreign commerce to St. Paul, Minnesota, over the Northern Pacific Railway.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, William Ratcliff, did knowingly, wilfully, unlawfully and feloniously on the 4th day of March, 1920, possess and conceal in his house at Auburn, in the Northern Division of the Western District of Washington of Washington, two rolls grass matting, well knowing that the same had been theretofore feloniously stolen from a railroad car moving in foreign commerce.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, Herbert William Hanson, did knowing-

ly, wilfully, unlawfully and feloniously on the 4th day of March, 1920, possess and conceal in his house at Auburn, in the Northern Division of the Western District of Washington, one roll grass matting, well knowing that the same had been theretofore feloniously stolen from a railroad car moving in foreign commerce.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, William Ratcliff did then and there knowingly, wilfully, unlawfully and feloniously on the 14th day of September, 1919, possess and conceal a certain sack of sugar, to wit, 50 pounds of sugar, theretofore feloniously stolen from an interstate shipment of sugar travelling in interstate from San Francisco, California, consigned to Powell-Sanders Co., Spokane, Washington, in Northern Pacific car 23,247, which said sugar said defendant William Ratcliff hauled in Northern Pacific R. R. train on September 14, 1919.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof, Lemuel S. Fowler, William Ratcliff and James Francis Mellison, on the 28th day of March, 1920, at Renton, in King County, in the Northern Division of the Western District of Wash-

ington, did then and there knowingly, willfully, unlawfully and feloniously offer to sell and dispose and negotiate for the sale and disposition of certain stolen property, to wit, certain automobile tires, lately stolen from Northern Pacific freight-car 101,-059 while moving over the Northern Pacific Railroad, from the city of Seattle, Washington, to the city of Portland, State of Oregon.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said Ethyl Hanson and Herbert William Hanson, and each of them, on the 28th day of March, 1920, at Auburn, in the Northern Division of the Western District of Washington, did then and there unlawfully, knowingly, wilfully and feloniously possess and conceal certain articles, goods, wares and merchandise theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting a part of an interstate shipment of freight, to wit, certain automobile tires, a more particular description whereof is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object of the same while said conspiracy remained in effect, at the city of Auburn, in King County, in the

Northern Division of the Western District of Washington, and on March 28, 1920, the said Ethyl Hanson, Herbert William Hanson, William Ratcliff, Lemuel S. Fowler and James Francis Mellison, and each of them, did knowingly, wilfully, unlawfully and feloniously assemble together and in automobiles proceed in a westerly direction to a point beyond what is known and called "Cemerery Hill," where they, and each and all of them, uncovered, discovered and removed a cache of goods, wares, and merchandise, to wit, automboile tires, theretofore stolen, removed, secreted, and hidden from the railway freight-cars in which they were moving in interstate commerce, and placed said tires in said automobiles and transplanted them in said automobiles to a point east of Covington, Washington, where said defendants, and each of them further uncovered, found and discovered certain goods, wares and merchandise, to wit, shoes previously stolen while being transported in interstate commerce, and then and there the said last above-named defendants, and each of them, proceeded to transport in said automobiles the aforesaid stolen goods and property to the city of Auburn, Washington.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the ob-

ject of the same, while said conspiracy was still in existence and effect, and on the 28th day of March, 1920, in King County, in the Northern Division of the Western District of Washington, the said Lemuel S. Fowler, William Ratcliff and James Francis Mellison, and each of them, did wilfully, knowingly, unlawfully and feloniously assemble together in the city of Renton, King County, at Edwards' garage.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of the same, while said conspiracy remained in effect, and on the 28th day of March, 1920, at Renton, in the Northern Division of the Western District of Washington, the said Lemuel S. Fowler, William Ratcliff and James Francis Mellison, and each of them, did knowingly, wilfully, unlawfully and feloniously negotiate for the sale of various and sundry articles, to wit, said automobile tires and shoes to one E. Hughes.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof, while the same was still in existence and effect, at Renton, in the Northern Division of the Western District of Washington, on March 28, 1920, the said Lemuel S. Fowler, William Ratcliff and

James Francis Mellison, and each of them, did knowingly, wilfully, unlawfully and feloniously, agree to sell said goods, wares and merchandise theretofore feloniously stolen from interstate shipments, to wit, said automobile tires and said shoes, a more particular description of which is to the grand jurors unknown, to one E. Hughes, for the sum and price of fifteen dollars (15) for each of said automobile tires and three dollars (3) per pair for each and all of said pair of shoes.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof, and while said conspiracy was still in effect, at Edwards' Garage, in the City of Renton, King County, in the Northern Division of the Western District of Washington, on March 28, 1920, the said Lemuel S. Fowler did knowingly, wilfully, unlawfully, and feloniously attempt to pull an automatic 38-calibre revolver and shoot Deputy Sheriff S. Campbell.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof,, while said conspiracy was still in effect, the said William Ratcliff, James Francis Mellison and Lemuel S. Fowler, and each of them, knowingly, wilfully, unlawfully and feloniously, unloaded

and disharged from said automobiles in which they transported said automobile tires and cases of shoes, on the 28th day of March, 1920, at Edwards' Garage, in the city of Renton, King County, in the Northern Division of the Western District of Washington.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object thereof. while said conspiracy was still in effect, the said William Ratcliff, James Francis Mellison, and Samuel Fowler, and each of them, knowingly, wilfully, unlawfully and feloniously, on the 28th day of March, 1920, assembled together in Edwards' Garage, in the city of Renton, in the Northern Division of the Western District of Washington, and then and there were armed with deadly weapons, each of them carrying a pistol.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of the same, while said conspiracy was still in effect, the said Lemuel S. Fowler at Auburn, in the Northern Division of the Western District of Washington, on March 25, 1920, knowingly, wilfully, unlawfully and feloniously, stated to one John Doe as follows: "Why do you want to know where Con-

ductor Scott lives?" to which John Doe replied, "I heard he had some auto tires to sell." Whereupon Fowler replied, "I am the fellow."

That after the formation of the said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, Herbert W. Hanson did then and there wilfully, unlawfully and feloniously, on March 23, 1920 offer, to sell and deliver to one John Doe Welch certain articles, goods, wares and merchandise, theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting an interstate shipment of freight, to wit, certain automobile tires and cigarettes, and other goods and chattels, a more particular description thereof being to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effe ct the object of said conspiracy, the said Lemuel S. Fowler, on the 23rd day of March, 1920, at the city of Auburn and vicinity, in the Northern Division of the Western District of Washington, did then and there wilfully, unlawfully and feloniously offer to sell and deliver certain articles, goods, wares and merchandise, theretofore feloniously stolen from a railroad car moving in interstate commerce and being and con-

stituting a part of interstate shipment, to wit, certain automobile tires for the price of ten dollars ($10) each, and certain cigarettes for the price of thirty-five dollars ($35) per carton containing one thousand cigarettes in each carton, and other goods and chattels, a more particular description is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said James Francis Mellison, on the 23rd day of March, 1920, at the city of Auburn and vicinity, in the Northern Division of the Western District of Washington, did then and there wilfully, unlawfully, knowingly and felonously offer to sell and deliver certain articles, goods, wares and merchandise theretofore feliniously stolen from a railroad car moving in interstate commerce and being and constituting a part of interstate shipment, to wit, pig tin to a certain John Doe Welch.

That after the formoton of said conspiracy and in pursuance thereof, and in order to effect the object of said conspiracy, the said James Francis Mellison, on the 29th day of March, 1920, at the city of Seattle, in the Northern Division of the Western District of Washington, did then and there wilfully, unlawfully and feloniously offer to sell and deliver to

Stewart Campbell in consideration of the said Stewart Campbell then and there releasing the said James Francis Mellison from arrest, certain articles, goods, wares and merchandise, theretofore feloniously stolen from a railroad car moving in interstate commerce and being and constituting a part of interstate shipment, to wit, pig tin, a more particular description of which is to the grand jurors unknown.

That after the formation of said conspiracy and in pursuance thereof, and in order to effect the object of the same, the said Joe Veagus, on the 24th day of January, 1920, walked to and approached the caboose attached to the freight train just brought in under the supervision of Conductor Thomas E. Jones, and said to Thomas E. Jones, "Did you bring any more of that stuff down this morning?" To which Thomas E. Jones replied, "No; look out, the bulls are coming,"—contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That on, to wit, the 30th day of March, 1918, and

continuously thereafter to the time of the presentment of this indictment,, at Seattle, in the Northern Division of the Western District of Washington, and wthin the jurisdiction of this court Lemuel S. Fowler, George E. White, Clarence H. Bellamy, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Herbert William Hanson, Ethyl Hanson, William Ratcliff, James Francis Mellison, Thomas Singer, David Jones and Creed Lane, George H. Trepanier and Mrs. J. A. Lewis, have unlawfully, corruptly and feloniously combined, conspired, confederated and agreed together, and one with the other, and together and with divers other persons to the grand jurors unknown, all of the said defendants hereinabove named and said other persons unknown being hereinafter called the conspirators, to commit an offence against the United States, to wit, to violate section 35 of the Penal Code of the United States, as amended by the Act of Congress approved October 23, 1918, it being there and then the plan, purpose and object of the *then and there the plan, purpose and object* of the conspiracy and of the said conspirators that they, the said conspirators, and each of them ,should and would knowingly, wilfully, unlawfully and feloniously take, steal and carry away for their own use of the said conspirators, and each of them, and

for the own use of the said conspirators, and each of them, and for the use of other persons to the grand jurors unknown, with the unlawful and felonious intent then and there on the part of said conspirators, and each of them, to steal and purloin certain personal property of the value of the United States; it being then and there the further plan, purpose and object of the said conspiracy and of the said conspirators, and each of them, that they, the said conspirators and each of them, would and should take, steal and carry away the said goods, wares, merchandise and chattels as aforesaid, and with felonious intent as aforesaid, from certain railroad cars, railroad station-houses, railroad platforms, railroad depots and railroad yards and premises then and there in and under federal possession and control.

That after the formation of said conspiracy, and in pursuance thereof and in order to effect the object thereof, the said several defendants, at and on the several places and dates in Count I of this indictment more particularly mentioned and set forth, did then and there knowingly, wilfully, unlawfully and feloniously do and commit each and all of those certain acts referred to and set forth and charged as having been committed by said

defendants in Count I of this indictment at and on line 9, page 4 to and including line 4, page 17, of this indictment, to which reference is hereby made, the same incorporated in this count as if more fully set forth herein; contrary to the form of statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT III.

And the grand jurors aforesaid, upon their oaths, aforesaid and continuously thereafter to the time of the present:

That on, to wit, the 30th day of March, 1918 presentment of this indictment, at Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, Lemuel S. Fowler, George E. White, Clarence H. Bellamy, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Herbert William Hanson, Ethyl Hanson, William Ratcliff, James Francis Mellison, Thomas Singer, David Jones and Creed Lane, George H. Trepanier and Mrs. J. A. Lewis, have knowingly, wilfully, unlawfully corruptly and feloniously combined, conspired, confederated and agreed together, and one with the other, and together and with divers other persons to the

grand jurors unknown, all of the said defendants herein above named, and said other persons unknown being hereinafter called the conspirators, to defraud the United States in the manner and by the means of following, to wit, that they the said conspirators, and each of them should and would knowingly, wilfully, unlawfully and feloniously take, steal, carry away, purloin, embezzle and convert to their own use certain goods, wares, merchandise, chattels and property then and there moving as and constituting a part of certain shipments of freight and express on and over certain railroad routes and systems of transportation *then there* under federal control, the said goods, wares, merchandise, chattels and property then and there being in the possession of the United States as a common carrier of goods for hire; and also certain tolls, equipment and property then and there used in the maintenance and operation of certain railroad routes and transportation systems then and there under federal control.

That after the formation of said conspiracy and in pursuance thereof and in order to effect the object thereof of the said several defendants, at and on the several places and dates in Count I of this indictment more particularly mentioned and set forth, did then and there knowingly, wilfully, un-

lawfully and feloniously do and commit each and all of those certain acts referred to and set forth and charged as having been committed by said defendants in Count I of this indictment, at and on line 9, page 4, to and including line 4, page 17, of this indictment, to which reference is hereby made, and same incorporated in this count as if more fully set forth herein; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ROBERT C. SAUNDERS.
United States Attorney.

To this indictment and each count of it the defendants demurred which demurrers were overruled. An exception was allowed.

After the jury was empaneled, the defendant, Wm. Ratcliff withdrew his plea of not guilty and entered a plea of guilty to each of the three counts in the indictment, and immediately thereafter toook the witness stand and became the first witness for the Government. The material part of his testimony, together with his cross-examination follows:

Record page 86 and following pages:

The COURT.—Let the records be changed and

the plea of guilty entered to each of the three counts. Move for sentence.

Mr. SAUNDERS.—The Government does not move for sentence, your Honor, but asks that it be postponed.

Direct Examination.

My name is *William Radcliff.* I am thirty-nine years of age, and by occupation a *railroad conductor;* I have been a railroad conductor for twelve years, working for the *Northern Pacific Railway Company.* I ran on the division from Auburn to Ellensburg and Ellensburg to Auburn. I was a freight conductor running on freight trains. The trains are classified as an "Extra" from *Auburn to Ellensburg* and from *Ellensburg back to Auburn. Auburn is the terminus of the Seattle division of Northern Pacific Railroad, and the freight-yards and roundhouse is there.* They handle in the freight-yards an average of five hundred cars a day; are in the yards nine day crews and seven night crews, numbering from a hundred men including engineers and switchmen. The crews make up the trains as they come in, break them up and make them up for the various points they are billed to. From the Auburn yards to Covington is eight miles.

On the other side of Covington is Mile Post 91; that is, counting from Ellensburg West.

From *March* 1918, up to the finding of the indictment, the *train crew consisted of three brakemen besides myself, the conductor.* The head brakeman rides the engine; the other two ride the caboose. The caboose is carried on the rear end of the train, and has a cupola for a lookout over the train on both sides. Inside the caboose is the clothes locker, toilet and lockers for coal and tools, there is just one clothes locker, and this is accessible to the four men of the crew.

On March 20, 1920, I made a trip from Ellensburg to Auburn, leaving Ellensburg at 9:00 A. M. and arrived at Auburn at 4:30 P. M. the same day. *C. H. Goldman, Dave Jones* and *H. W. Hanson* were my brakemen on the trip.

I heard a conversation between the defendants Dave Jones and H. W. Hanson in my caboose on that trip about getting shoes. They said that they were going to get four cases of shoes and that they had a sale for them. The four cases of shoes were in the Northern Pacific freight-car; in the P. F. E. refrigerator-car. The train consisted of forty-five cars carrying merchandise.

On the east side of the divide before we got to

Easton, I heard the defendants, Jones and Hanson in conversation. After the conversation they carried the four cases of shoes off of the train and put them in the salal brush, about Mile Post 91,—about three miles east of Covington. The train stopped at this point because of a hot-box on a car of coal; it stopped about 30 minutes. I saw the defendants Jones and Hanson take these shoes in their boxes from the car and cache them in the salal brush. It was about 2:30 P. M. The train then proceeded to Auburn and arrives there at 4:30 P. M.

Mr. Hanson said he had a sale for the shoes and the money would be equally divided between the three of us. He gave samples of the shoes to a man named Ayers to be sold in Renton and got a price for them.

Witness identifies cases of shoes as those having been taken out of the car and cached in the salal brush, by defendants Jones and Hanson.

Between the time the shoes were taken out of the car and hidden, and now, I have seen two cases of them.

On the evening of March 27th last, I had a talk with Hanson about these shoes; and also with Mrs. Hanson and a man named Ayers. Hanson and his

wife live about a mile from my house at Auburn. William Hanson came to my house that day in an automobile; my wife was there at that time. Hanson proposed that we go up and get the shoes in the salal brush near Mile Post 91. We held a conversation with Ayers. Ayers was in his car, and Hanson's car was standing close to Ayers' car at the corner of Main and Enumclaw Road. Hanson said that a sale had been made; he said that samples had been furnished Ayers, and that Ayers had made a deal with Rogers at Renton, a dollar and a half for the canvas shoes and three dollars for the other shoes. Ayers was to get a commission of 60c a pair for selling the shoes, on delivery.

I got into Hanson's car, with Mrs. Hanson and Herbert William Hanson. Hanson's car went first and was followed by Ayers' car containing Ayers alone. They walked up into the salal brush, and after about thirty minutes got two cases of shoes that I have identified here, carried them down the road and loaded them into Ayers' car. We then went to Auburn. On arriving at Auburn, Hanson said he was tired, and asked me to go to Renton and collect the money. We went up to the foot of the Pacific Highway where it meets the road leading to cemetery hill. Ayers signalled with a spotlight and

waited twenty minutes. We then drove back to Auburn.

Ayers and I went to the St. Elmo Hotel, owned by Mrs. J. A. Lewis, one of the defendants here. It was about 12:30 A. M. on the morning of the 28th. I rang the office bell and she came down to the door. I asked for Fowler; I told her that Ayers had an agreement to meet him that night with some tires she said he was up on the hill getting some tires. Then I told her I had a shoe deal. She said "Who is the man?" I says: "I don't know." I told her they were sold in Renton, and the man was recommended to me by Hanson as having done quite a bit of business with him before and he was all right. She said nothing else.

Ayers and I got into the machine and went out to the foot of cemetery hill, worked a signal a few times at the side of the hill, and Fowler's car was seen coming down with yellow headlights on. Fowler's car came within fifty feet of the rear of the machine we were in, and contained Fowler and a man unknown to me, and twelve automobile tires. I later saw the tires when they were unloaded at Renton. I did not hear Fowler say anything when he drove up. I looked out of the car and I could see Fowler and Ayers talking a couple of minutes; I did

not hear them. Ayers then drove his car to Renton, followed by Fowler. I rode in Ayer's car. We got to Renton and went into the alley to the garage; it was Rogers' garage; we waited while Ayers went and notified Rogers that the goods had arrived; in a little while Rogers came down and opened up the sliding-doors of the garage; Ayers drove in and unloaded the shoes, two cases of which I have identified; as Ayers backed out of the garage, Fowler drove in; as Ayers backed out, the deputies came in.

Rogers says: "Count the shoes while I help him get those tires out." Then the sheriffs came in and arrested the three of us, myself Fowler and Mellison; Mellison was the man who had come down the hill in Fowler's machine. Ayers worked an automatic on the sheriffs and backed the car out of the garage. He has been seen in Auburn several times since. The automatic revolver was taken off Fowler. Mellison, Fowler and I were taken to jail. The Chinese matting offered in evidence as Government Exhibits 5 and 6, were taken off my train on March 2d, 1920. The matting came out of a Pennsylvania car. The members of my crew were C. H. Goldman, Dave Jones and W. H. Hanson. Goldman was head brakeman; Dave Jones and Hanson were also brakemen. Jones and Hanson took the two rolls of mat-

ting out of the car at Easton. Before they took them, Hanson told me he was going to get some matting. The matting was left on the right of way at Easton until we came back. The matting was thrown out of the car at 11:15 P. M. We got back to that place at 6:00 P. M. on the 3rd. Jones and Hanson picked up the matting and threw it into an empty car, and it was hauled to Covington and put off in the brush by Hanson and Jones.

Hanson afterwards went up in the automobile and got the matting, and left two rolls at my house. He left it on the morning of the 4th.

I identify Government's Exhibit 7 as a Wheel Report, showing that the matting was being hauled out from Auburn towards Ellensburg, on the Pennsylvania Railroad 43,493. Car was marked "bad order." It had a defective door. The top was open at least eighteen to 20 inches, and was not connected at the top.

I know the defendant Trepanier; he was a brakeman and ran as part of my crew a few trips. He lived in Auburn. Late in October, 1918, Trepanier brought an electric drill to my house. I had some work to do but could not use the drill. Trepanier told me he had one,—said he had gotten it out of a railroad car a couple of months prior to that time.

The drill was an electric, Tempco single motor drill. I had it about seven days and Mr. Trepanier came and took it away. I could not identify the drill; there are hundreds like it and I did not get the number of it. I failed as a conductor to protect the property of the railroad company.

Mrs. Lewis is the proprietor of the St. Elmo hotel, at Auburn, Washington. Fowler rooms in her hotel; how long he has roomed there I dont know.

Cross-examination

(Question by Mr. DORE.)

Q. Mr. Ratcliff, you were the conductor on these two trains? The train that the shoes came off of, and the train that the matting came from?

A. Yes, sir.

Q. And the agreement—the conspiracy to rob the railroad, to which you have pleaded guilty, consisted of an agreement to steal from the car upon which the shoes were, and the cars upon which the matting was—that was the criminal conspiracy that you were a part of it? A. Yes.

Q. With which of these defendants did you ever enter an agreement to commit a crime against the railroad? A. Hanson and Jones.

Q. Hanson and Jones. Those are the only two?

A. Yes, sir.

Q. Those are the only two people of all these defendants that you had any agreement to violate any of the laws of the railroads belonging to the United States?

A. Yes, sir.

Q. And these three conspiracies to which you have entered a plea of guilty included both of your co-conspirators, Hanson and Jones, and no other persons in this court?

A. Yes, Sir.

Q. You never in other words, had any agreement to commit any crimes with George H. White?

A. No sir.

Q. And you didn't plead guilty to any crime to which he was a party? A. No, sir.

Q. And you never had any agreement to commit any crime with Clarence H. Bellamy.

A. No, sir.

Q. And you had no agreement to commit a crime wtih Albert Bruce Paris? A. No.

Q. And you had no agreement to commit any crime or crimes with Thomas E. Jones? A. No.

Q. Or with Edward Bourdell?

A. No.

Q. Or with Sarah Jones? A. No.

Q. Or Joe Vargus? No.

Q. But You did with Herbert William Hanson?

A. Yes, sir.

Q. And you did with Ethel Hanson, so far as you have related? The only connection, I understand, that she had with that affair, is that she was a passenger in this car the day you went to get the tires?

A. Yes.

That is all the connection she had, she just rode along to get the tires? A. Yes.

Q. That is all the connection she had? She just rode along when you went out in the car to get the tires and to get the shoes? A. Yes, sir.

Q. That is all Ethel Hanson had to do with it. She was the wife of Herbert William Hanson. William Ratcliff is yourself. With James Francis Mellison you never had any agreement of any kind?

A. No, sir.

Q. All you know about Mellison is, when Fowler came down the road in an automobile that had some tires, Mellison was with him, isn't that true?

A. A man unknown to me.

Q. Afterwards you learned him to be Mellison?

A. Yes, sir.

Q. After he was arrested. You never knew Mellison before he was arrested? A. No, sir.

Q. Consequently you never had any dealings or agreement or conversations relating to theft with Mellison? A. No.

Q. And Thomas Singer. I take it you never heard of Thomas Singer in your life until you met him here

in this court. You never had any dealing with Thomas Singer? A. No, sir.

Q. He was a party to no crime of conspiracy which you were ever in. And David Jones, he was in this one that you are in? A. Yes, sir.

Q. Creed Lane, yau never had anything to do with him? A. No, sir.

Q. And Trepanier, all that yau had to do with him was that you told him you needed an electric drill to do some work with, and he brought an electric drill down to your house; isn't that true? A. Yes, sir.

Q. You and he never stole the drill together?

A. No, sir.

Q. You had no agreement to steal it? A. No.

Q. You had personally nothing to do with the drill excepting using it?

A. I did not use it; I could not use it.

Q. Trepanier knew; he was on the train that you were running a couple of times? A. Yes, sir.

Q. Those times nothing was stolen; is that right?

A. Yes, sir.

Q. Nothing was stolen then? A. No.

Q. As I understand, Mrs. J. A. Lewis,—stand up, Mrs. Lewis,—that is Mrs. Lewis? A. Yes, sir.

Q. She is the owner om the St. Elmo Hotel in Auburn? A. Yes, sir.

Q. That is the largest hotel in Auburn, is it?

A. Yes.

Q. It is a hotel of fifty or sixty rooms. Auburn is a railroad town? A. Yes, sir.

Q. The population, or the chief occupation of the majority of the population is railroading, isn't it?

A. Yes, sir.

Q. The railroad group makes up the great part of the population. The occupants of practically all the hotels, including the St. Elmo Hotel, are railroad employees, aren't they? A. Yes, sir.

Q. And Fowler lives at the St. Elmo Hotel; isn't that true? A. That I don't know.

Q. You never had any agreement with Mrs. Lewis to rob any box-cars, and steal anything, in interstate commerce? A. No, sir.

Q. You never had any transaction with her in regard to stolen property or anything like that?

A. No. Sir.

Q. As I understand, all you know about Mrs. Lewis —the only dealings she had with you, you went to her hotel one night and asked where Fowler was?

A. Yes.

Q. And she told you that Fowler had gone up on a hill to get some tires? A. Yes, sir.

Q. And you told her that you were selling some shoes, did you? A. Yes, sir.

Q. She asked you to whom you were selling the shoes? A. Yes.

Q. And you told her to a man named Ayers; is that it?

A. A man named Ayers was the salesman and the purchaser was Rogers in Renton.

Q. She had nothing to do with either Ayers or Rogers so far as you know?

A. Absolutely nothing.

Q. And absolutely all she had to do with you was, she came to the door of the hotel when you inquired for Fowler, and said she thought Fowler was up on the hill getting some tires; is that right? A. Yes.

Q. Now, this fellow Fowler, he runs a stage or jitney, up here in Auburn; that is his occupation?

A. I don't know.

Q. You don't know that he does that? A. No.

Q. All you know about Fowler that night is that he came along the road with an automobile in which the tires were? A. Yes, sir.

Q. You had nothing to do with those tires?

A. No, sir.

Q. You were not connected with those tires any more than I am connected with them?

A. No, sir.

Q. You never stole them, never conspired to steal them; never agreed to steal them with anyone, nobody agreed to steal them with you, or to have anything to do with those tires so far as you are concerned? Is that right? A. That is right.

Q. The conspiracy that you are in included only you, and David Jones and Mr. Hanson; is that right? A. Yes, sir.

No terms were made to me for pleading guilty. I wanted the drill because I was doing some work on a patent car lock,—so that the seal could be abolished and a lock used. Hanson, Jones and myself are equally quilty of stealing shoes and matting. I was the conductor. Jones was the middleman and Hanson was the rear man. The head brakeman stays on the engine and handles the head end of the train; to head the train in and out of sidings. He doesn't attend to hot-boxes or broken bars unless it is close to the end of a long train. The head brakeman takes his orders from the engineer when he is on the train, and all the brakemen are responsible to the conductor.

Roy Ayers—A Detective

The Roy Ayers referred to in Ratcliff's testimony was a detective in the employ of the Northern Pacific Railroad for the purpose of causing the arrest of persons stealing from box cars. He posed as a mid dleman-man for the sale of stolen goods. and in this way gained the confidence of those whose arrest he was intending to bring about. (Record p. 99).

Ayers testified that he went to Auburn in November, 1919, and opened up a garage. The garage, however, was for the purpose of throwing off

suspicion from his real occupation, that of a railroad detective. He testified he knew Lemuel S. Fowler, the plaintiff in error, Herbert William Hanson, Mrs. Hanson and Wm. Ratcliff, James Francis Mellison, David Jones, Creed Lane and Mrs. J. A. Lewis.

He did not, however, know Clarence H. Bellamy, George E. White, Albert Bruce Paris, Thomas E. Jones, Edward Bourdell, Sarah Jones, Joe Veagus, Thomas Singer or George Trepanier. He followed Ratcliff to the witness stand.

The following enquiry was made of him: (Record p. 99)—

> Q. "Now while you were in the garage business at Auburn did you have negotiations and dealings with these defendants, or any of them, concerning stolen property?
>
> A. Yes, sir.
>
> Q. Now, begin at the beginning; who was the first defendant, what was it about, and about when?"

Assignments of Error—One to Five

At this point the following objection was made to the introduction of testimony relating to any conspiracy other than the conspiracy related by the witness Ratcliff.

The Ratcliff conspiracy being confined to himself,

Herbert William Hanson, Ethmyl Hanson and David Jones.

The objection as it appears from the Record, page 100 was as follows:

Mr. Dore: "Now, your Honor, I object on the ground that it is incompetent, irrelevant and immaterial for this reason: Mr. Ratcliff has pleaded guilty to three conspiracies. He said that there was no one in these conspiracies except Jones and Hanson.. The Government must try one single criminal agreement here, or at least the three criminal agreements which they have elected by Ratcliff's testimony to bind themselves before the doings of the other defendants becomes admissable with this great mass of stuff that is here. The Government must first connect these defendants with Ratcliff and with this conspiracy that, according to their own testimony at this time there was no one in except Mrs. Hanson, Mr. Hanson and Dave Jones. You can't try a score of conspiracies, or a score of groups, or a score of different crimes here.

It is true the agreement may be single, and the object may be multiform, that is true, but still before testimony as to what other defendants did or said to this man, or what dealings he had with them,

they must be brought within the scope of this conspiracy. Now, to narrow this case, we demand at this time, or at least to save time, the Government state to the Court what conspiracy they are trying here, and who they intend to prove the conspirators are, and they be permitted to introduce no testimony against any defendant except such as they may state to the Court their proof will show to be members of the conspiracy that Ratcliff has already testified to."

The Court: "I cannot rule of what the evidence shows in advance of hearing the evidence. Objection overruled."

Palintiffs in error admit that at this point in the trial the Court's ruling was undoubtedly correct. There was no way for the Court to tell what the condition of the Government's case would be at the end. However, as plaintiffs in error will hereinafter point out, the situation from a legal standpoint was just the same at this point in the case as it was at the close of the Government's case, when the plaintiffs in error, together with the other defendants made a motion to compel the Government to elect between the conspiracies that Ratcliff had testified to and the other separate and distinct conspiracies that had been proven in the case and the plaintiffs in error

took an exception to the Court's refusal to compel this election. (Record, p. 145).

Ratcliff's testimony ,as has been pointed out, was to the effect that he, together with David Jones, Herbert William Hanson and Ethyl Hanson, were involved in a consummated theft of several cases of shoes, and also of some Chinese matting from the Northern Pacific Railroad. He, together with David Jones and Herbert William Hanson composed the crew of the train from which these articles were stolen. Ratcliff maintained in his cross-examination, and at all times, that no persons, other than those he had specified, had any connections with these thefts, and positively denied that he had never been involved in any other thefts or in any other crimes, or any other conspiracy to steal.

Ayers Catches Two at Once

Ayer's testimony was to the effect that he had learned that Hanson had the shoes and that Hanson and Ratcliff had stolen the shoes. He posing as an ostensible buyer of stolen goods, made an arrangement with Ratcliff and Hanson for the delivery of the shoes by automobile to a garage in Renton. Ayers had by arrangement with his superior officers

caused the arresting officers to be concealed in the garage.

After Ayers, the railroad detective, had made arrangements with Hanson and Ratcliff, he learned through an independent source, from Conductor Scott, that the plaintiff in error Fowler was in the possession of some automobile tires. These tires that were found in the possession of the plaintiff in error, Fowler, were shipped from Seattle, Washington, to Portland, Oregon, and were stolen in transit between Seattle and Auburn. None of the defendants ran on trains that operated between Seattle and Auburn. Some were conductors and brakemen on trains running from Auburn to Ellensburg, but none, at any of the times in question had ever worked between Seattle and Auburn.

There is an entire absence of testimony as to how and when the tires were stolen. All that is known of the tires is that they were shipped from Seattle to Portland and never reached Portland; that Fowler offered them for sale to Ayers; that Ayers offered to buy them from Fowler, who was operator of automobiles for hire, and who made arrangements with Ayers to meet him on a public highway with the automobile tires, and that Ayers was to flash a light when he was ready for Fowler to keep his appoint-

ment. Mellison was a passenger in Fowler's automobile on the night of the delivery of the automobile tires to the garage in Renton. Mellison, however, was found not guilty on all three counts by the jury.

There is absolutely no evidence showing any connection between Fowler and the group composed of Ratcliff, David Jones, Ethyl Hanson and Herbert William Hanson. In fact, Ratcliff in his testimony denied that he ever had any connection whatsoever with Fowler. It simply happened that the detective for the Northern Pacific Railroad decided to set a trap for Ratcliff, Hanson and Jones simultaneously with the trap that he set for Fowler and Mellison.

Fowler, according to the testimony, was never involved in any of the transactions except that of the automobile tires that he was delivering at the garage in Renton. Fowler may have, according to the testimony, been guilty of stealing these tires from the Northern Pacific Railroad; or he may have been guilty of having them in his possession, knowing them to have been stolen.. For this offence he was indicted under another indictment and now awaits trial. But there was no evidence connecting him with the conspiracy in which Ratcliff, David Jones, Herbert William Hanson and Ethyl Hanson had a part.

The tires stand out alone by themselves. There is no testimony except Fowlers as to how they came into his possession. His testimony amounted to an entire denial of all guilt. Of course, the verdict of the jury means that the jury refused to credit his testimony, and probably for the same reason this Appelate Court may justly refuse to credit it.

That Fowler had nothing to do with the conspiracy to steal and the consumated stealing connected with Radcliff, is borne out by the testimony of Ayers, at page 104 of the Record. After relating his apprehension of the Ratcliff party he testified as follows:

> "I learned that Fowler had tires to sell through a conversation I had with Scott, a railway conductor. After Scott told me that Fowler had some tires to sell, Fowler came to me and told me that he had thirteen tires. I told him that I had a buyer at Renton who would buy them. I told Payne (chief railroad detective) about Fowler and the tires on March 27th. Fowler was just an addition to the party."
>
> Q. "You picked him up accidently?
>
> A. Just accidently."

Clifford W. Scott, the person from whom Ayers testified he got his information regarding the tires that were found in Fowler's possession, corroborated

(at page 111 of the Record) Ayers upon this proposition.

> "I have known Fowler about a year. On March 17th I met him. About March 17 of this year I met him on the main street in Auburn. I asked him if he had some tires he wanted to get rid of and he said he did; he wanted to know if I had a place to get rid of them; I told him I did; he wanted to know how much he could get for them and I told hi mI didn't know. He went and got a price list and we talked about the price list; we separated and afterwards met Mr. Ayers, and I had no further conversation with him that I know of."

The further testimony in the case can be briefly outlined as follows:

Upon a search warrant the hotel of Mrs. J. A. Lewis at Auburn was searched. In the house was found six knives of a similar pattern, but not identified as the identical knives, stolen from an interstate shipment. Mrs. Lewis was acquitted.

Edward Bourdell and George E. White were roommates and fellow railway employees. In the room of Bourdell was found stolen clothing that had been taken from interstate shipments. Bourdell committed suicide during the trial before he had been furnished any opportunity to take the witness stand in

his own defense. The verdict, however, finds him guilty. George E. White, his room-mate, was found not guilty.

In the home of Creed Lane, a railway brakeman, was found a mass of merchandise of all kinds and descriptions, that had been stolen from interstate shipments. The merchandise found in Lane's home had been stolen from trains upon which Bourdell, Bellamy and Thomas E. Jones were the members of the crew.

In a caboose of a Northern Pacific train, of which Thomas E. Jones was the conductor, Edward Bourdell and Creed Lane the brakeman, some stolen property of small value was found. In Bellamy's home was found an overcoat that was identified as part of an interstate shipment stolen from a car upon which Bellamy, together with Creed Lane, Thomas E. Jones and Edward Bourdell were members of the crew. Testimony was introduced showing that all this merchandise was interstate commerce.

Mrs. Sarah Jones ran a hotel in Auburn. In her hotel was found some merchandise identified as stolen. Joe Veagus' connection with the case is an alleged conversation with Thomas E. Jones; Ethyl Hanson's connection with the case is that she rode

with her husband in an automobile containing some stolen property; George H. Trepanier's is that he loaned a drill to Ratcliff. Sarah Jones, Veagus, Thomas L. Jones, Ethyl Hanson and George H. Trepanier were acquitted.

Thomas Singer, the second plaintiff in error, ran a hair dressing establishment in Seattle, under the name of Thomas Singer, Inc. It is admitted by the Government and there is no testimony to the contrary, that the only defendant that Singer ever met was Bourdell. The Government's testimony relating to Singer is covered by the examination of the testimony of J. M. Clark, a witness for the Government. (Record p. 126)

Bourdell had been a customer of Thomas Singer's company for some years. He had gone to France and while in France had had Singer forward him some hair-dressing goods. Clark testified that some time in February Bourdell came into the store. Bourdell was wearing a toupee that he had purchased in the store. Bourdell had some shoes; Singer insisted that his partner Clark try on some of the shoes. The shoes did not fit Clark. Singer asked Bourdell if he thought he could get some others to fit Clark, Bourdell said he wasn't sure.

After Bourdell was gone, during the same day Clark asked his partner Singer when Bourdell was going to pay for the toupee he was wearing, the price of the toupee being $35. "Singer said that Bourdell had already paid for it" and Clark said "how do you figure that? I have no record of it having being paid for and Singer said 'Well, I got an overcoat from him'. Clark said, "That is a funny way of straightening up the firm's account," and he said, "you had a chance to have a pair of shoes and you turned it down; that is your fault. Clark said, "Who is this fellow Bourdell, anyway, who is he and what is he," and Singer told me he was a freight clerk in the railroad. I says, "How does he come to be peddling this stuff?" He says, "Well, he is no worse than the rest of them; all these railroad men, they get all kinds of stuff that they want; they can get it". (Record, p. 127).

About two weeks later Bourdell came into Singer's place and left a bundle in which was some clothing. The Government didn't offer any explanation of why it was left there. Singer's testimony on this point was that it was left for safe keeping. However, the contents of the parcel was never identified as property of the railroad.

Clark's testimony about the overcoat was borne

out by the finding of an overcoat belonging to Hart-Schaffner and Marx that had been shipped from Philadelphia to Seattle and stolen in transit. Singer was wearing this overcoat. When an explanation was demanded as to how he came into possession of the coat, he stated he had bought it off of Hart Schaffner & Marx store in Seattle. It was proven conclusively that no coat of the style or pattern had ever been in possession of Hart Schaffner & Marx store in Seattle, and that it was the identical coat stolen enroute from Philadelphia to Seattle.

The train from which the coat was stolen was one upon which Edward Bourdell, Creed Lane and Tom Jones were members of the crew.

It was conceded by the Government, and no evidence was ever offered to dispute the fact, that Singer had no acquaintance with anyone except Bourdell. It was admitted by the Government that Singer did not know Fowler; did not know Creed Lane; did not know Herbert William Hanson or William Ratcliff. It is also admitted by the Government that Singer's sole connection with the affair, outside of his acquaintance with Bourdell, was the acceptance of the stolen overcoat for a toupee.

It is true that the Government proved by the testi-

mony of J. B. Armstrong, who owned the Buster Brown Shoe Store in Seattle, that Singer had negotiated with him (Armstrong) for the rental of a part of the shoe store, to be used by Singer in his hair dressing business and that in a conversation one day Singer inquired of Armstrong if he ever bought shoes from others than the manufacturers. Armstrong stated that he did and Singer stated that he had a friend who sold Shoes. Some days afterwards he brought Bourdell to Armstrong's store and introduced him as the man to whom he had referred, who had shoes for sale. Singer went away. Bourdell showed Armstrong some shoes, which Armstrong did not desire to purchase. This was the end of the transaction.

Singer had never heard of Fowler until they were jointly indicted and had never seen him until he had seen him in court. This was the condition of the record at the time the motion to compel the Government at the close of its case to elect against which group of conspirators it desired to proceed.

The evidence did show that Ratcliff, David Jones, Herbert William Hanson and Ethyl Hanson, composed one separate and distinct group, that there was an agreement among them to steal and dispose of property belonging to the Nor-

thern Pacific Railroad and that these thefts had been consummated. A verdict of guilty returned against these four by the jury would undoubtedly have to be sustained, as there would be some evidence in support of it, of course, the weight and the amount of evidence being a question for the jury. However, the jury found David Jones and Ethyl Hanson not guilty.

Fowler was connected with nothing but the tires. When they were stolen, where they were stolen or by whom they were stolen, there is no evidence in the case to show. It is true that Fowler was attempting to sell them; Mellison was with him. It may well be said there was evidence showing that Fowler and Mellison constituted another group. The jury, however saw fit to acquit Mellison.

Creed Lane, Tom Jones, Edward Bourdell, George E. White and C. H. Bellamy all worked together on the trains from which goods in interstate commerce were stolen. Some of these stolen goods were found in Creed Lane's house; some in Bellamy's house; some in Edward Bourdell's room; some in George E. White's house and some in the caboose on the train, which was under the care and control of Thomas E. Jones as conductor. It might plausibly

be contended that it had been shown that these five constituted a group.

The evidence shows that Singer knew no one except Bourdell; that he purchased a stolen overcoat from Bourdell; the evidence would probably be sufficient to sustain the verdict against Singer had he been convicted of possessing an overcoat knowing the same to have been stolen from an interstate shipment.

Trepanier loaned the stolen drill to Ratcliff. The court, of course, granted him a directed verdict.

Joe Veagus was accused of speaking some meaningless words to Tom Jones in the freight yard at Auburn; he likewise, received a directed verdict of not guilt. In the house of Albert Bruce Paris some stolen goods were found. The court, however, held that there was no connection with the rest of the defendants and granted him a dirceted verdict.

The motion to compel the Government to elect should have been granted.

We have the anomalous situation here of Ratcliff pleading guilty and judgement being passed upon ing for a conspiracy which his testimony shows and which all the evidence corroborated could have con-

tained no one except Ratcliff, Herbert William Hanson, Ethyl Hanson and David Jones. The only thefts that Ratcliff had anything to do with, as said before was the matting and the shoes. None of the other defendants were present at the time of these thefts; none of them knew anything about them; none of them ever had any of the goods in their possession; none had ever offered to sell any. One judgment certainly is not broad enough to include five or six groups that had nothing to do with each other; never had any criminal agreement; never committed any criminal acts together.

It is true that the Government was not bound by Ratcliff's testimony. Even after he had testified on behalf of the Government, the Government could have produced other witnesses to show that Ratcliff falsified when he said there were only four in his conspiracy. They could have introduced evidence to show there was others besides David Jones, Herbert William Hanson, Ethyl Hanson and William Ratcliff. This opportunity was open to them, but at no time did they ever meet it.

The plaintiff's in error now challenge the Government to point out in their brief any testimony that connected any of the defendants with William Ratcliff, except the persons that he named as being his

co-operators and fellow conspirators in crime, to wit: David Jones, Ethyl Hanson and Herbert William Hanson. There is no evidence in the case to show this.

The motion to compel the Government to elect should have been granted.

The conspiracy statute has indeed been given a broad application. It has sometimes been called a drag net to catch the innocent and the guilty, but in no case has it ever swept so broad a surface as in this case. We have seventeen defendants going to trial with a final result of five convicted. The mere statement of the proposition shows that something was fundamentally wrong somewhere. The thing that was wrong was that a number of persons, whom the evidence shows may have been guilty of the crime of stealing property, composing parts of inter-state shipments, or a number of groups of persons who were stealing property, were all linked together, without any connection in fact. No evidence was introduced to connect them.

The motion to compel the Government to elect should have been granted. It was reversible error to refuse to grant it. The motion for a directed verdict as to Fowler should have been granted and of

course if the motion for a directed verdict should have been granted, the verdict should be set aside because there is no evidence to support it.

The error in refusing to grant the motion for a directed verdict, the motion being made at the close of the Government's case, and again at the close of the defendants' testimony raised the same question, and the plaintiff's in error will treat the assignment based upon these points simultaneously.

The plaintiff in error, Fowler challenges the Government to point out to this honorable court who stole the tires found in his possession; when were they stolen; what connection did any of the other defendants outside of James Francis Mellison, who was acquitted, have to do with the tires, or with Fowler. What connection did Mellison, who has been acquitted, have to do with any of the other defendants, Ratcliff, Mellison and Fowler were arrested at one and the same time and Ayers, the railroad detective, as explained, testified for the Government, and his testimony is not only uncontradicted, but is supported by all the other testimony in the case, that he, for the matter of convenience, decided to expose two pieces of thievery at one and the same time.

One automobile, in which were Ratcliff and Ay-

ers, contained the shoes. Ratcliff's testimony and all the testimony shows Fowler had never seen the shoes until he saw them in the garage at Renton at the time of his arrest. Shoes, the Government proves beyond a doubt were stolen by Hanson and Ratcliff, and which the jury refused to believe, Ethyl Hanson and Dave Jones were implicated in.

It would be a strange doctrine of criminal law, that because an officer decides to arrest two alleged thieves at one and the same time, each in possession of different property, property stolen at different times and different places with no connection between the thieves, that there would be evidence to sustain a conspiracy charge between the two apprehended thieves.. Throughout the entire trial, Fowler and the tires stood alone, separate and distinctly, unconnected with anyone. When and how he came into possession of the tires was never explained; who gave them to him was never explained; where they were stolen was never explained; where they were before Fowler had them in his automobile was never explained. There is no evidence connecting Fowler with any other stolen property. None other was found in his possession. There was no conversation between him and the other defendants. There was no connection; no partnership. Ayers learned

through a railroad man that Fowler had some tires; Ayers decides that they were stolen; he gets the information from a conductor, not a defendant in this case, or not implicated in any of the criminal acts in any way. Ayers lays a trap for Fowler and catches him. It is true he laid a trap at the same time to catch Ratcliff and his group.

Fowler, from the evidence was undoubtedly guilty of an offence. The offence of having received property stolen from inter-state commerce, knowing the same to have been stolen. If he had been convicted of that offence, this argument would not be tenable in his behalf, but instead of that he was convicted of a conspiracy without any evidence showing that he had ever been connected with any other person in this case or in the world to steal property that was being shipped in inter-state commerce.

The mere fact that he is guilty of a different crime than conspiracy lends no support to the claim that a judgment finding him guilty of conspiracy should have been sustained. If the Government can point out a single piece of evidence that in any way connects Fowler with any individual in this case, or any other property except the tires, or connects any other person in the case with the tires, then there may be some fallacy in this argument. It is undoubt-

edly true that one may be guilty of a conspiracy with persons that he has never met or that he has never known. Still there must be a connecting link between him and the unknown. There must be some person in between who knows the other, and acts as a connecting link in the criminal design, criminal plan or criminal operation, but this one is wanting here.

An analysis of the testimony, together with a verdict of the jury, leads one to the conclusion that the jury convicted each and every person, who had in his possession any great amount of stolen property and acquitted every person who had no stolen property, or had stolen property of very little value.

Ratcliff, of course, was convicted on his plea of guilty; Hanson was convicted upon Ratcliff's testimony; Creed Lane had a roomufl of stolen property, he was convicted. Fowler had an automobile full of stolen tires, and he was convicted, but between Ratcliff's and Hanson's matting and shoes, Jones roomful of merchandise, Fowler's tires and Bourdell's merchandise there was no connection whatsoever.

The case against Singer differs in no way from that against Fowler from a legal standpoint, except

that it was proven that Singer purchased a stolen coat from Ed. Bourdell and that he introduced Ed. Bourdell as a man who had shoes to sell. There was no evidence in the case to negative the idea that the shoes that Ed. Bourdell was selling were honestly come by. There is no contention that the shoes were stolen from an inter-state shipment. The testimony had only probative value to the effect that the relationship between Bourdell and Singer was intimate.

The Government concedes that Singer never actually stole anything. That he never did anything but receive this coat. This under no interpretation of the law would be sufficient to convict him of being a party to a criminal agreement to loot box cars. The person who steals property and the person who receives it, knowing it to have been stolen, do not stand in the relation of conspirators.

They are both guilty of a separate offence. One of larceny for the actual theft and the other of having received stolen goods, knowing them to have been stolen, which may or may not be larceny, depending upon the statute. The elements of the offences are different. The facts that prove one do not prove the other. Of course, the person

that possesses property, knowing it to have been stolen, and the person who actually stole it, may have been in a criminal agreement to steal it; the evidence may establish this fact beyond a reasonable doubt, yet it takes evidence to do it. The proof that one steals property, another is in possession of it, raises no presumption that there was an agreement or confederation or combination between the possessor and the thief for the stealing of the property.

The first assignment of error is more or less related to assignment 2, 4 and 5. That the Government in calling Ratcliff as a witness after he pleaded guilty and by passing judgment and sentence upon him ,confined themselves to the conspiracy of which he, Ratcliff, was guilty, is a proposition that carries with it its own proof. The idea that a defendant can plead guilty to a conspiracy, be sentenced and that other defendants can be included in the same judgment that in the Government's own testimony and all the testimony in the case had nothing to do with the crime to which the plea of guilty was entered, is novel and unsound.

Sixth, Seventh, Eighth Assignmnets of Error

The sixth assignment of error, the seventh and the eighth assignment of error may be

all grouped together. The defendant, Sarah Lewis, testifying in her own behalf, took the witness stand before Fowler did. Fowler had offered no testimony in his own behalf and the other defendants in offering their testimony had not connected him in any way with themselves or with their transactions. At that time the reputation of Fowler and his credibility were not at issue. He had not offered himself as a witness. Mrs. Lewis was asked the following questions:

"Q. Do you know Lemuel Fowler? A. Yes.

Q. How long have you known him?

A. Oh, ten years, I should judge; nine or ten years.

Q. At Auburn?

A. At Seattle and Auburn.

Q. How long has he been a roomer at your hotel? A. Ever since he has been in Auburn."

To this point the inquiry undoubtedly was proper; it was proper to show the acquaintanceship between the defendants. However, from this point on the inquiry was improper and grossly prejudicial.

"Q. You knew he was arrested, charged and convicted of stealing during that time?

Mr. DORE—I object to that as incompetent, irrelevant and immaterial.

Mr. SAUNDERS—I think, your Honor, we have a right to ask.

The COURT—Objection overruled.

Q. Answer the question please.

A. Yes, I did."

Amendment V. to the constitution of the United States reads as far as applicable to this assignment as follows:

"Nor shall be compelled in any criminal case to be a witness against himself."

The most effective way to compel a defendant who wishes to avail himself of the benefit of this amendment to be compelled to forego it is to introduce testimony in advance of his offering to testify that he has been previously convicted of crime. No such tactics as were employed in this case can be allowed if the constitutional guarantee is to be allowed to stand.

By this testimony, Fowler was forced on the stand. The rule against allowing a first conviction to be proved against a defendant before he testifies in his own behalf finds its main reason for its existence in this country in protection of the defendant's constitutional right to remain silent. The mere fact that the conviction may have been a fact—or

that it is afterwards wrung from the defendant when he takes the stand does not cure the error. It is a club with which he is driven to the stand. It is a court room third degree. A declaration of the prosecution "Well, if you think you are going to remain silent you are mistaken. We will show your criminal record. We will make you through fear take the stand."

It certainly was not competent until Fowler had taken the witness stand and placed his credibility in issue. It could have no other effect than to prejudice the jury against Fowler in advance. It was introduced at the time it was for the purpose of getting to the jury the fact that Fowler had at some previous time been convicted of stealing; whether the stealing constituted grand larceny or petit larceny was not pointed out.

A defendant's credibility cannot be called into question by proof of his conviction of crime prior to the time he takes the witness stand. This proposition is elementary. The reason for it being that the defendant may be entirely innocent of the crime for which he is being tried but may have a long criminal record. He may be led to refrain from taking the witness stand in his own behalf in order to keep from the jury the fact that he had been con-

victed of a crime, and risk by his silence an imputation of guilt rather than to disclose his past. The law allows him this privilege. If it were permissible for the prosecution to, by direct examination, elicit his criminal record before he took the witness stand, he would practically be forced upon the witness stand to explain not only the offence of which he was charged, but his past record.

Seventh Assignment of Error.

The seventh assignment of error occured when Fowler himself was a witness. The question was (Tr. of Record p. 71).

Q. You left the employ of the N. P. in 1917?

A. Yes, sir.

Q. Under conviction of theft from cars?

Mr. DORE—I object to that as imcompetent, irrelevant and immaterial.

Q. And you left the employ of the N. P. when you were convicted of theft from box cars?

A. I plead guilty of petit larceny, yes, sir.

Q. From a box car? A. No, sir.

Q. From the railroad. A. No, sir.

Q. From what then? A. For having the goods in my possession.

Q. That came from the box cars, stolen

goods? A. They came from the box cars.

Q. I am asking you, you plead guilty to having stolen goods in your possession? A. Yes, sir.

Q. And you have not been in the railway's employ since?

A. No, sir.

The Court refused to pass upon the objection. If the objection was not well taken, or course, no error was committed in the court failing to pass upon it, although it would have been not improper for the court to have done so. If, however, the question was objectionable and the proper objection was made, the Court, by its refusal to rule, compelled the witness to answer, then an error was committed. The only question that would affect the credibility of the witness was whether or not he had been convicted of larceny, a felony; a conviction of petit larceny would not affect his credibility.

Secondly, even if the question had been as to whether he had been convicted of grand larceny the prosecution would have been estopped from going any further. The only purpose in pursuing the inquiry further as to whether the goods of which the defendant had pleaded guilty of possession, knowing them to have been stolen, came from box-cars, was to

induce the jury to deduct from this prior conviction the probability that in the present case he was guilty of a similar offence. This is not permissible A defendant on trial for picking pockets may have been convicted before of picking pockets. It is proper to inquire if he has been convicted of larceny or grand larceny. It is, however, improper to convey to the jury the impression that he is guilty of picking the pocket for which he is on trial by asking him if he has been found guilty prior to picking another pocket. Juries are prone to reason from a past conviction of a similar offence, identical in commission to guilt for a present offence.

In *State v. Gottfreedson*, 24 Wash. at page 399, we find this practice held error. The defendant was on trial for horse stealing. The court says:

> "We think, however, the court erred in compelling the defendant, who offered himself as a witness, to testify that he had been convicted of horse stealing, the statute provides that no person offered as a witness shall be excluded from giving evidence by reason of the conviction of a crime, but such conviction may be shown to affect his credibility. When it was shown that the defendant had been convicted of a crime, the demands of the statute had been met; for the purpose of the statute is only to affect the credibility of the witness, and not to

prejudice the minds of the jury by parading before them the fact that the witness had been guilty of the exact crime for which he was then on trial. The tendency of such testimony as that on the minds of the jury would not be so much to affect the witness's credibility as to cause the jury to conclude that, because he had been before convicted of horse stealing, the probabilities were that he was guilty of stealing the horse in question."

Tenth Assignment of Error

The Tenth Assignment of Error relating to the objection assigning error because of the form of judgment should be sustained. The plaintiffs in error were sentenced to eighteen months concurrently on each count and $500 on each count, making an aggregate of $1500.

Of course, if the plaintiffs in error wer esenten ced to 18 months on each count, the sentence to run concurrently, if one count was good, the objection would have to be valueless. However, the levying of a fine of $500 upon each count makes it a matter of financial importance to the plaintiffs in error as to whether the objection should be sustained as to one, two or three counts. Count 1 states briefly that the defendants violated the conspiracy statute

by conspiring to violate section 1 of the Act of Congress, approved Feb. 13, 1913, entitled, "An act to punish the unlawful breaking of seals of railroad cars, containing inter-state or foreign shipments; the unlawful entering of such cars; the stealing of freight or express packages, or baggage or articles in process of transportation in inter-state shipment and felonious transportation of such freight or express packages or baggage or articles therefrom into another district of the United States, and the felonious possession or reception of the same.

The alleged overt acts to count 1 set out in the indictment cover twenty-five pages of the record, pages 2 to 25.

The second count charges that the defendants on the same dates as on count 1 conspired together to violate sec. 35 of the penal code of the United States, as amended by the Act of Congress, approved Oct. 23, 1918, again making it a felony to steal the property of the United States Government. The overt acts are not set forth in full in this count, but it is stated that they are the same as in the first count.

Count 3 of the indictment alleges that the same defendants were guilty of conspiracy under the conspiracy statute itself, without reference to

any other statute, in that they conspired to defraud the United States in the manner and by the means following, to wit: That they, the said conspirators, and each of them, should and would knowingly, feloniously take, steal, carry away, purloin, embezzle and convert to their own use certain goods, wares, merchandise, chattels and property then and there moving as and constituting a part of certain shipments of freight and express on and over certain routes and system of transportation, then and there under Federal control, the said goods, wares, merchandise, chattels and property then and there being in the possession of the U. S. as a common carrier of goods for hire; and also certain tools, equipment and property, then and there used in the maintenance and operation of certain railroad routes and transportation systems then and there under Federal Control".

No overt acts are set forth in detail in this count. However, it is alleged that they are the same and identical with those set forth in the first count of the indictment. So the indictment itself charges that by the same overt acts the defendants committed three separate and distinct conspiracies. Whatever may be said of the indictment ,there was no attempt upon the trial to show three separate and

distinct conspiracies. It was the contention of the Government that there was one conspiracy; that is, one criminal agreement, and this criminal agreement, singular in itself, was to do acts that were violative of three separate and distinct statutes of the United States. It needs no argument and no authorities to sustain the position that a criminal agreement unified and singular to do acts violative of a number of laws is one conspiracy and not as many conspiracies as there are statutes to be violated. A single agreement among a group, or an agreement to which a number of persons become participants, violative of a hundred statutes is still one conspiracy, and this is true even though the crimes that are to be committed are not similar. An agreement to murder, to rob and to steal, entered into by a band of criminals, as long as the agreement is singular, is one conspiracy and not three conspiracies. Again we request the Government to point out any evidence to this court that tends to show that Ratcliff, together with his co-operators ever had but a single agreement to violate the statutes of the United States. The judgment in this case upon one count cannot be sustained against any of the defendants. cannot be sustained against any of the plaintiffs in error. The judgment against Ratcliff could

have been sustained upon only one count of this indictment. Even were the facts sufficient as against the plaintiffs in error to sustain a conviction of conspiracy, a judgment could only be entered upon one count, as there was no proof of more than one agreement.

Section 37 of the penal code, defining conspiracy, is as follows:

"If two or more persons conspire to commit an offence against the United States or to defraud the United States in any manner, or and one or more of such parties do an act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000.00 or imprisoned for not more than two years, or both."

Assignment of Error Three

Assignment of Error three is to the Court's refusal to sustain the demurrer made to each count separately (Record 31-33).

Although this assignment relates to the demurrer, yet the assignment also sustains plaintiffs' in error contention that a verdict of not guilty should have been granted to Count II. and to Count III.

The demurrer was properly overruled as to count one of the indictment. Count two, however, purports to charge a conspiracy to violate Section 35 of the penal code of the United States, as amended by Act of Congress approved October 23, 1918. The part of the statute alleged to have been violated is included in these words:

> "The taking, carrying away, or taking for his own use or for the other, with intent to steal or purloin any personal property of the United States or any branch or department thereof and any corporation in which the United States of America is a stockholder."

The property that it was alleged that the conspiracy was formed to purloin was property of the United States, according to the pleading, because it was being transported in inter-state commerce, and at that time the inter-state commerce carriers were under the control of the Director General of Railroads.

Count three was drawn under Section 37 itself, making it a crime to defraud the United States, and the fraud which it was alleged the conspiracy was formed to perpetrate upon the United States was the stealing of tools and equipment belonging to the railroads while they were under federal control.

That the railways and equipment were not the property of the United States, so as to bring it under Section 37 of the statute, has been decided in the case of *Salas v. United States*, 234 Fed. 842. Quoting from the syllabus:

> "When the United States enters into commercial business, it abandons its sovereign capacity, and is to be treated like any other corporation; therefore, though it absolutely owns the Panama Railroad Company, and is the only one profiting or losing by the railroad company's activities, a conspiracy to defraud the railway company is not a conspiracy to defraud the United States, denounced by Penal Code (Act March 4, 1909, c. 321) par. 37, 35 Stat. 1096 (Comp. St. 1913, par. 10201), and in such case the United States can gain redress only by suit by the railroad company to recover damages."

In the Salas case it must be noted that the Government owned all the stock of the corporation that owned the Panama Railway. Federal control of the railways by the United States under act of Congress did not vest in the United States as great a proprietorship as that of the Panama Railway Company. The conspiracy to steal properties of the railways while under Federal control, as charged under count two, and conspiracy to defraud the

United States government by the taking and stealing of tools and equipment from the railroads while under Federal control, are acts that are not within the purview of either the conspiracy statute itself or of the statute that makes it a substantative offence to steal property of the United States. The railways were not the properties of the United States, as that word is used in Section 35 of the penal code of the United States as amended by Act of Congress approved October 23, 1918, and a fraud perpetrated upon the railway's management while under the control of the United is not such a fraud as is denounced by Section 37 of the penal code.

The demurrer interposed to count two and count three was well taken and should have been sustained. It was error to overrule it.

At the close of the Government's case and at the close of the defendant's case the motion to direct a verdict of not guilty, being directed to each count of the indictment separately, should have been sustained as to count two and three. The evidence had shown that the Government had no interest in any of the property, except that it was operating the railway and, as operator, was transporting the goods. The evidence al-

so showed that all the goods and equipment belonged to the railway company and not to the Government. There was an absence of any proof to show that the Government had any interest in the shipment or in the equipment or tools of the railroad, except the fact that the railways were under federal control.

The same legal reasons that made it necessary to sustain the demurrers made it necessary to sustain these motions.

The judgment as to plaintiff in error Fowler should be reversed.

The judgment as to the plaintiff in error Singer be reversed.

Respectfully submitted,
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